**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br><br>**Plaintiff and Respondent,**<br><br>**v.**<br><br>**DAVID V. CARSON,**<br><br>**Defendant and Appellant.** | **No S117568**<br><br>**Court of Appeal No. B153072**<br><br>**Los Angeles County Superior Court No. PA034279** |

# APPELLANT DAVID CARSON'S ANSWER BRIEF ON THE MERITS

**(After reversal in the published decision of Court of Appeal for the Second Appellate District, Division Seven)**

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## INTRODUCTION

Though much maligned, the right to self-representation in a criminal trial arising from the Sixth Amendment is an unconditional and robust one. In *People v. Dent* (2003) 30 Cal.4th 213, this Court recognized that a trial court's failure to acknowledge and grant a timely request for self-representation required a new trial - even in a long and costly death penalty case. As the Court of Appeal recognized in the present case, a timely request for self-representation must be granted, and the right sustained, except under very limited circumstances. Only a defendant who is incompetent to stand trial at all, who attempts to manipulate Sixth Amendment rights to delay a trial, or who obstructs and disrupts the trial process may be denied his right to self-representation.

By far the most common subject of the reported cases on this subject concern the second ground - efforts, direct or indirect - to delay the trial either by demanding self-representation on the eve of trial or during trial, or by shifting between representation and self-representation with the effect of delaying the trial.

It has been undisputed throughout these proceedings that appellant David Carson made no effort to delay his trial through the manipulation of his right to represent himself and that he was fully competent to stand trial.

This case concerns the third ground for denying self representation. First articulated in *Faretta v. California* (1975) 422 U.S. 806, 834 fn. 46 (*Faretta*), itself, it allows a trial court to refuse to grant a defendant self-representation if he "uses the courtroom for deliberate disruption of his trial." Appellant never disrupted the trial process in any way. Indeed, his representation was unusually skilled and he advanced the progress of his case with motions and argument presented at a high level.

At most, Mr. Carson is accused of obtaining discovery of impeachment evidence while representing himself that the trial court had ordered he not see. As his own attorney, he was entitled to the evidence - a criminal "rap" sheet - to determine the course of his cross-examination of a possible prosecution witness. He violated a court order that was itself improper. Had he been an attorney, misconduct of this type would have warranted little more than a slap on the wrist. No court would have removed an attorney from the case under these circumstances. Yet the trial court did just that - emboldened by wholly improper interference from the prosecution, it removed Carson as his own attorney and appointed counsel against his express wishes. In so doing it rejected a number of lesser measures which would have preserved appellant's right to represent

himself. Since *Faretta,* no court, including this one, has sanctioned a denial of self-representation rights on this ground.

**The Decision of the Court of Appeal**

Following the virtually unanimous weight of authority in state and federal courts, the Court of Appeal held that Carson had not disrupted his trial and reversed his conviction. (*People v. Carson* (2003) 109 Cal.App.4th 978.)[1] The Court of Appeal cited *Faretta* and applied the "serious and obstructionist misconduct" standard as elaborated in *Illinois v. Allen* (1970) 397 U.S. 337 and *McKaskle v. Wiggins* (1984) 465 U.S. 168. (*Id.*, at pp. 984, 985.) It concluded that the standard applied in revocation cases. (*Id.*, at p. 988.) It confirmed, as a matter of fact, that "defendant engaged in no disruptive or obstructive conduct" and reversed the judgment. (*Ibid*.) It noted that Carson received some discovery to which he may not have been entitled and that the trial court could impose a sanction short of revocation of self-representation. It criticized the prosecutor's interference with appellant's right of self-representation, noting with this Court that prosecutors must tread very carefully on self-representation issues since error is reversible per se. (*Id.* at p. 988, n. 10; *People v. Dent, supra*, 30 Cal.4th at p. 222, fn. 2.) It suggested that a trial court intent on denying Sixth Amendment rights rely on something more substantive than bare argument from the prosecutor. (*Ibid.*)

The Court of Appeal cited and discussed this Court's opinion in *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, but did not reverse because

[1] This Court's grant of review automatically depublished the decision of the Court of Appeal. However, the prior official citation is used here because it is universally accessible.

appellant's behavior occurred outside the courtroom. (*Id.* at p. 987.) In a footnote, the Court of Appeal counseled this Court to refrain from using the present case to revisit *Ferrel*. (*Id.* at p. 989, n. 12.) The Court of Appeal had not relied on *Ferrel*, but applied the well established "disruptive or obstructive misconduct" standard. This case is a poor vehicle for exploring the applicability of *Ferrel* because the Court of Appeal did not rely on *Ferrel.* It is a poor vehicle for exploring the limits of *Faretta* because the record is barren of any evidence that appellant sought to obstruct the trial by manipulating his Sixth Amendment rights. The Court of Appeal opposed any reconsideration of *Ferrel* in this case almost certainly because under no standard, federal or state, could the trial court's action here be sanctioned.

**Respondent's Argument**

Respondent suggests that any action by a self-represented defendant to "subvert" a trial would justify revocation of the Sixth Amendment right. (RBM 18.) It cites the Court of Appeal for the proposition that revocation be allowed where the "core integrity of the trial" is threatened or where the defendant's conduct "threatens to compromise the court's ability to conduct a fair trial." (RBM 15; *People v. Carson, supra*, 109 Cal.App.4th at p. 989, fn. 12.) Although the comments are dicta, appellant parts company with the respondent and the Court of Appeal here. The language suggested by the respondent and the court is too broad and vague and would conflict with the overwhelming weight of authority that the defendant has the right to represent himself even if he does a terrible job doing so. (*Godinez v. Moran* (1993) 509 U.S. 389, 399 [125 L.Ed. 2d 321, 113 S.Ct. 2680]; *McKinney v. State* (2003) 850 So.2d 680, 681, 682.) To some, virtually no trial in which a defendant represented himself would be a "fair" trial. Such a broad

standard would open state judgments to reversal in federal court under well-established federal constitutional standards. (See, *United States v. Flewitt* (9th Cir. 1989) 874 F.2d 669.)

The vague standard suggested by respondent is completely unsupported by state or federal authority. It represents a radical departure from the limits established in *Faretta* itself and attempts to include within the definition of "obstruction" all manner of defendant behavior which may or may not actually interfere with the trial. The adoption of a standard unsupported by the unanimous weight of authority from this Court and the United States Supreme Court is ultimately unproductive. (See i.e., *People v. Frazer* (1999) 21 Cal.4th 737 and *Stogner v. California* (2003) 539 U.S. [123 S.Ct. 2446, 156 L.Ed.2d 544].)

Two concessions by respondent, one factual and one legal, are fatal to its argument that the carefully reasoned and thoroughly cited decision of the Court of Appeal should be reversed. First, respondent states as a factual matter, " . . . the case now before this court does not involve a defendant who was unruly in court." (Respondent's Brief on the Merits (RBM) 12.) On this point, it is in complete agreement with the Court of Appeal's finding that "defendant engaged in no disruptive or obstructive conduct." (*People v. Carson* (2003) 109 Cal.App.4th 978, 988.) Since it was and is undisputed that appellant was competent to stand trial and did not attempt to delay his trial, this concession removes the last possible support for the revocation of his self-representation.

In addition, although respondent quibbles with a phrase in *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, it concedes that the result in that case was correct. (RBM 14.) Since the facts in *Ferrel* are virtually identical to the present case, the concession applies here as well. As a practical matter,

these concessions leave the Court with virtually no grounds upon which to reverse the Court of Appeal.

The correct legal standard to be applied in this case is whether appellant deliberately engaged in serious and obstructionist misconduct. The Court of Appeal applied that standard. Therefore, appellant Carson respectfully requests that this Court affirm the decision of the Court of Appeal reversing his convictions.

## STATEMENT OF THE CASE

Appellant David Carson was charged by information with one count of assault by means likely to produce great bodily injury (Count 1; Pen. Code, § 245, subd. (a)(1)), one count of mayhem (Count 2; Pen. Code, § 203, and one count of murder. (Count 3; Pen.Code, § 187, subd. (a); CT 148-150.) It was alleged that appellant inflicted great bodily injury in the course of the assault in violation of Penal Code, section 12022.7, subdivision (a). It was also alleged that he personally discharged a firearm and personally used a firearm in violation of Penal Code, section 12022.53, subdivisions (b), (c) and (d). (CT 148-150.) Appellant denied all charges and special allegations. (CT 151.)

On December 6, 2000, appellant's motion to represent himself was granted. An attorney was appointed stand-by counsel. (CT 173.) On March 23, 2001, the trial court ordered county sheriffs to remove all documents from appellant's cell and transport them to the court. (CT 238.) On June 6, 2001, these documents were returned to appellant at the jail. (CT 277, 278.) On March 28, 2001, the trial court revoked appellant's right to represent himself due to irregularities in discovery. (CT 239.) The propriety of the revocation is the issue now before the Court. The trial

court appointed standby counsel as appellant's counsel against his wishes. (CT 239.) On June 16, 2001, the court denied appellant's petition for writ of habeas corpus raising the self-representation issue, among others. (CT 294.)

Jury trial commenced on June 27, 2001. (CT 374.) On July 23, 2001, the jury found appellant guilty on all counts and found all special allegations to be true. (CT 585-587.) The aggregate sentence was 6 years plus 50 years to life. (CT 602, 603.)

Appellant filed his timely notice of appeal on August 31, 2001. (CT 604.) On June 12, 2003, the Court of Appeal reversed the conviction on the ground that appellant had been denied his constitutional right to represent himself. (*People v. Carson* (2003) 109 Cal.App.4th 978, rev. granted September 10, 2003.)

## STATEMENT OF FACTS

Because the issue at hand does not concern the underlying charges, the facts are summarized here.

**Count 3.**

At approximately 11:30 p.m. on Friday, September 10, 1999, Eddie Rodriguez was fatally shot in his truck at the corner of Bellingham and Otsego in North Hollywood. (RT 107, 817, 818.) Rodriguez was a busy dealer of a wide variety of illegal drugs. (RT 171, 174, 175, 184, 210, 211, 212, 216, 260, 644, 664, 1161-1168, 1256.) He arranged to meet customers at various locations. (RT 176, 179, 204, 648.) He habitually carried a gun. (RT 181, 182, 196, 257.) Appellant was one of his customers. (RT 1242-

1246, 1251.) Appellant was always on friendly terms with Rodriguez. (RT 1247.)

Lavere Ross, a friend and customer, bought marijuana from Rodriguez between 7:00 and 7:30 p.m. at Rodriguez' apartment on September 10. There were four other men at the apartment and they also saw the money. (RT 186-192.) There were no Black males in the apartment at that time. (RT 669.) Appellant is Black. (CT 607.)

Cell phone records showed that appellant was approximately 14 minutes from the site of the offense at 11:32 p.m., when it occurred. (RT 774, 805, 1468, 1472.) A local resident heard four pops and the racing of an engine while walking her dog. (RT 303.) She saw a small blue pick up truck billowing smoke with its engine at full throttle. (RT 305.) Rodriguez was slumped over the steering wheel. (RT 305, 895.) She later observed a red pick up truck pull up and park by the side of the road.[2] (RT 308, 1189.) She described the driver to police as a male Hispanic with an olive complexion with very short dark hair and a partial beard. (RT 329, 1191.) No other witness could confirm her report. (RT 859, 873.) One witness denied that he saw such a truck. (RT 873, 897.)

A ballistics expert testified that, in his opinion, the bullet found in the truck and the two found in Rodriguez were fired from the same gun as two bullets found in the door casing of appellant's apartment. (RT 462, 525-529, 574-578, 1404, 1405.) Appellant owned a semiautomatic .380 or 9mm hand gun. (RT 90, 92, 1177, 1309, 1345.) Twice, he shot the gun at the molding of a door in his apartment. (RT 94, 96, 98, 253.)

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[2] Appellant owned a red GMC truck with a distinctive Jack in the Box antenna ornament. (RT 99, 133.)

**Appellant's Actions on September 10, 1999.**

Rose Periott, appellant's girlfriend, and appellant were frequent users of marijuana, and by the morning of September 10, 1999, they were in need of more. (RT 1005, 1006.) Appellant called Rodriguez, his supplier, that morning and throughout the day and evening in order to buy some more. (RT 1264, 1265, 1281.) Appellant worked all that day. (RT 1269, 1270, 1293.) Later that evening, Rodriguez called appellant at appellant's home and said he was on his way. (RT 1284. He appeared in his truck shortly thereafter and blew his horn. (RT 1284.) Appellant bought marijuana from Rodriguez in the truck some distance from the house. (RT 1056, 1285, 1286.) At the time, an Hispanic male with a bald head was sitting in the jump seat of Rodriguez' truck. (RT 1285.) Appellant returned home about 10 minutes later. (RT 1022, 1286.) He did not see Rodriguez again that night.

Appellant then left for 45 minutes to meet a friend. (RT 1025, 1287.) Later, he drove on the freeway to see other friends who needed some marijuana. (RT 1287.) At 11:06 p.m. he called Rodriguez from near a Chinese restaurant to tell him about a party that night. (RT 1288.) At 11:23 p.m. he called Rodriguez for about a minute to tell him he did not know exactly where the party was. (RT 1289.) He got a page from Rodriguez at about 11:30 p.m. and returned it, but could not reach him. (RT 1290, 1291.) Ultimately, appellant voluntarily surrendered to police. (RT 1035, 1299.)

Appellant wrote letters while jailed on the present charges. Authorities confiscated a number of letters appellant wrote to friends and others establishing an alibi. (RT 615, 628, 629, 671, 672-676, 691-697.)

Appellant admitted that he wrote the letters and that portions were not true. (RT 1301-1308, 1388-1428.) He wrote them because he was terrified of being prosecuted and did not trust the system to reach a just result. (RT 1358.) He was shocked at Rodriguez' death. (RT 1323.)

**Counts 1 and 2**

Eddie Gomez and appellant were friends. (RT 227, 1228.) At appellant's request, Rose Periott started sharing Gomez' apartment. (RT 231, 1231.) Gomez was upset that Rose and appellant were not paying the agreed rent and that there were other problems. (RT 245.) According to Gomez, as they argued, he turned toward the wall and appellant hit him once with his fist in the right eye and twice in the kidney area. (RT 248.) His eye was permanently damaged. (RT 251, 397.)

According to Rose and appellant, Gomez attempted to rape Rose as she slept in the apartment on the night of August 21, 1999. (RT 987, 988, 1233.) The fight broke out when appellant came to rescue Rose and help move her possessions out of the apartment. (RT 990, 1326.) Gomez initiated the attack and appellant defended himself. (RT 993, 995, 1043, 1237.)

## STATEMENT OF ISSUES

This Court reviews the decision of the Court of Appeal. (Cal.Const. art. VI, § 12, subd. (b).) Respondent has declined to address the issue framed in its own Petition for Review, instead addressing the issues as described by the Court's public relations department, which are as follows:

1. Can a defendant's right of self representation be terminated only for in-court misconduct that disrupts or obstructs trial proceedings, or

are there circumstances in which a defendant's out-of-court conduct may support the termination of his or her right to represent himself?

2. If a defendant's out-of-court conduct may support the termination of self-representation in some circumstances, did defendant's out-of-court misconduct in this case justify such termination?

## ARGUMENT

## I. THE CRIMINAL DEFENDANT'S RIGHT TO REPRESENT HIMSELF MAY BE TERMINATED ONLY WHERE HE ATTEMPTS TO DISRUPT THE ORDERLY PROGRESS OF HIS TRIAL.

This is the rare case in which a defendant who was extremely skilled at mounting his own defense at trial was nevertheless deprived of his right of self-representation because he obtained full discovery.[3] The Sixth Amendment to the federal constitution guarantees appellant and all defendants the virtually unconditional right to represent themselves in a criminal trial. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).) Appellant chose to represent himself well before the trial began. When the trial court revoked his pro per status for behavior that did not disrupt or delay his trial, it violated his constitutional rights.

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[3] In *People v. Clark* (1985) 168 Cal.App.3d 91, 108, the court held that it was not error to grant a *Faretta* motion to a defendant who was "intelligent, literate and articulate" and "a person of exceptionally high order of intelligence." The possibility that a lay defendant could be a good advocate was also foreseen in a particularly prescient statement in *United States v. Flewitt* (9th Cir. 1989) 874 F.2d 669, 675,( "Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense.")

The seminal case on the issue now before the Court is *Faretta v. California* (1975) 422 U.S. 806. Like the present case, *Faretta* arose from a criminal prosecution in Los Angeles County. (*Faretta* at p. 807.) Like the present case, the trial court had granted the defendant the right to represent himself well before trial. (*Faretta* at pp. 807, 808.) As in the present case, the trial court revoked the defendant's self-representation status, also well before trial. This Court had ruled in *People v. Sharp* (1972) 7 Cal.3d 448, 459, that the defendant had neither a federal nor state right to self-representation. Thus, despite the statements of both the Court of Appeal and respondent that the law of revocation is unclear or limited, the fountainhead of all modern self-representation law was itself a revocation case. It provides substantial guidance in the present case and limits the right of a trial court to revoke self-representation.

In *Faretta*, the United States Supreme Court overruled this Court's decision in *Sharp,* at least insofar as it purported to interpret the federal constitution, and held that a criminal defendant had a right to represent himself arising from the common law and the Sixth Amendment. ". . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of the accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution." (*Faretta* at p. 815, citing *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 279, 280 [63 S.Ct. 236, 87 L.Ed. 268].) *Faretta* prohibits a criminal court from forcing an attorney on the defendant.

At issue are the meaning and implications of an extensive footnote in *Faretta*, reproduced in full here:

> We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See *Illinois v. Allen*, [1970] 397 U.S. 337. Of course, a State may -- even over objection by the accused -- appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. See *United States v. Dougherty*, 154 U.S. App. D.C. 76, 87-89, 473 F. 2d 1113, 1124-1126. The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."

The final lines of the footnote foreclose a defendant from proffering his own incompetence as a ground for reversal. However, as the Court of Appeal recognized, the *Faretta* court did not state that mere failure to comply with court rules could result in the revocation of pro per status. (*People v. Carson, supra,* 109 Cal.App.4th at p. 986; see also *United States v. Flewitt*, *supra*, 874 F.2d at p. 674.)

The two cases cited in the footnote provide some guidance as to the extent and meaning of the term "serious and obstructionist misconduct." In *Allen,* the United States Supreme Court held that a defendant could be excluded from the courtroom if he ". . . insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (*Allen* at p.343.) As confirmed by the Court of Appeal, the defendant in *Allen* threatened the judge and was abusive towards the court and the court process. (*People v. Carson*, *supra*, 109 Cal.App.4th at p. 985.) He talked over the judge and told him "you're going to be a corpse." (*Allen* at p. 340.) He tore his attorney's file and threw it to the floor. He told the judge that there would be no trial. (*Allen* at p. 340.)

The other case cited by the Supreme Court in *Faretta* was *United States v. Dougherty* (1972) 473 F.3d 1113. Although *Dougherty* was a pre-*Faretta* case it still contains one of the most thorough discussions of self-representation found in the cases. *Dougherty* held that a right to self representation in federal statutes that could be waived by "disruptive behavior during trial." (*Dougherty* at p. 1123.) *Dougherty* was careful to distinguish the "unorthodoxy, confusion and delay" likely to arise from representation by a non-lawyer from intentionally obstructive tactics. (*Dougherty* at pp. 1124, 1125.) It also held that a pro se defendant should be warned of the consequences of such behavior. (*Ibid*.) It noted that disruptive behavior after the denial of self-representation would not suffice, and that isolated instances in which the defendants interrupted the court were insufficient, either by themselves or as grounds to predict future disruptive activities. (*Dougherty* at pp. 1126, 1127.)

Taken together, *Faretta* and the cases cited on the disruption issue hold that the right of self-representation may be denied or revoked only when the defendant disrupts the progress of the trial. A rarely used exception, recognized but not applied in *Dougherty*, is discussed (but also not applied) in more detail in *United States v. Flewitt, supra,* 874 F.2d 669. In *Flewitt*, the defendants made repeated unsuccessful discovery requests and refused to review available discovery. (*Flewitt* at p. 671, 672.) Confirming that the footnote in *Faretta* concerns "disruption in the courtroom," the court in *Flewitt* noted that "pretrial activity is relevant only if it affords a strong indication that the defendants will disrupt the proceedings in the courtroom." (*Flewitt* at p. 674.) Thus, defendants whose behavior before trial is so disruptive that a trial court finds they will also be disruptive in trial can be deprived of their rights to self-representation. No reported case has sanctioned a denial of self-representation rights on this ground.

Viewed in the context of the law of self-representation, this Court's unanimous decision in *Ferrel v. Superior Court* (1978) 20 Cal.3d 888 is entirely consistent with established standards. In *Ferrel*, the defendant argued that a violation of jail rules did not support a revocation of self-representation unless the defendant deliberately engaged in "serious and obstructionist misconduct intended to disrupt the trial or abuse the dignity of the courtroom." (*Ferrel* at p. 891.) The defendant had used a legal runner, obtained as a result of his self-representation status, as a courier for his jail gambling winnings, damaged a telephone and had been the subject of several incident reports and disciplinary proceedings while in jail. In a result that is fully approved by respondent, this Court ruled that since none

of these activities had disrupted the defendant's trial or abused the dignity of the courtroom, his *Faretta* right had been wrongly revoked.

Respondent's sole complaint about *Ferrel* is contained in a single phrase in which the Court stated that a defendant could only be deprived of self-representation if he engaged in "disruptive in-court conduct." (*Ferrel* at p. 891.) The Court did not address a case in which any out-of-court conduct by the defendant had or threatened to have a disruptive effect on the trial itself. "A case is not authority for an issue neither raised nor considered. (*People v. Myers* (1987) 43 Cal.3d 250, 265, fn. 5; *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7; *McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38.)" (*People v. Wells* (1996) 12 Cal.4th 979, 984, n. 4.) Thus, *Ferrel* was correctly decided within the factual context presented - jail misbehavior which did not disrupt a trial.

As respondent also notes, other California cases have not interpreted the law of self-representation so narrowly and, at least where a purpose to delay is alleged, have considered delaying behavior, whether in or out of court, in determining a *Faretta* issue. (*People v. Fitzpatrick* (1998) 66 Cal.App.4th 86, 93; *People v. Rudd* (1998) 63 Cal.App.4th 620, 624.) This Court has confirmed that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*People v. Clark* (1992) 3 Cal.4th 41, 115.) No California case, including *Ferrel*, has held, contrary to federal authority, that out of court disruptive behavior cannot be considered in determining whether the defendant will disrupt the trial. In *Ferrel*, as here, the defendants' jail behavior simply did not affect the orderly progress of trial proceedings. Thus, the legal determination to be made by trial courts in these cases is not

the location of the defendant's conduct, but whether it was calculated to disrupt the smooth progress of the trial.

It is clear, however, that whether the behavior was in or out of court is a very important factor to be considered in determining whether there is a "strong indication" that a defendant will disrupt his trial. If he does so in court, no more need be shown. However, if he engages in misconduct outside the courtroom, it must be of a nature that will assure the trial court that it will not be able to conduct a timely, calm and dignified trial if the defendant represents himself.

At most, *Ferrel* failed to explicitly condition the statement concerning in-court behavior with a caveat that disruption out of court, not found there, could also be relevant. For instance, in *Eady v State* (Fla.App. 1997) 695 So.2d 752, 753, the court granted the defendant's *Faretta* motion. Subsequently he told the court that he would not let the trial proceed. (*Ibid.*) He cursed the court. He demanded to be removed from the courtroom and the judge obliged. Although his absence was by its nature not "in court," it was an effort to disrupt the trial and was considered in determining that his rights had not been violated. Since the *Ferrel* court did not consider facts like those in *Eady*, it cannot be fairly criticized for fashioning a rule that applied to the facts at hand.

Respondent argues that self-representation may be denied for other than serious and obstructionist misconduct, citing *State v. Whalen* (Ariz. App. 1997) 961 P.2d 1051, 1055 and *Illinois v. Allen*, *supra,* 397 U.S. at 344. (RBM 13, 18.) *Whalen* is a disruption case; the defendant refused to cross the bar to represent himself. *Allen* is a case in which the defendant was removed from the court for outrageously disruptive behavior. Neither expands the well settled rule regarding disruptive behavior. Thousands of

cases address *Faretta* and the circumstances under which the right may be denied or revoked. Not a single case has refused self-representation for alleged witness intimidation. There is no authority for respondent's position and no facts in the record supporting it.

Since Mr. Carson did not disrupt his trial while in court, and nothing he did in jail slowed the progress of his trial, he was entitled to represent himself.

## II. APPELLANT DAVID CARSON NEVER ATTEMPTED TO DISRUPT THE ORDERLY PROGRESS OF HIS TRIAL.

Acting as his own counsel, appellant did nothing to disrupt his trial as that term is used in *Faretta* jurisprudence. His self-representation was as good as or better than he might have received from a member of the bar. The behaviors alleged by respondent either occurred while he was represented and before he was granted the right to represent himself or had no effect on the progress of the trial.

### A. The Ruling of the Trial Court Should Be Subjected to Independent Review.

Respondent argues that review in this case is for an abuse of discretion. (RBM 12.) However, since appellant requested self-representation in a timely manner, the trial court had no discretion to deny the motion or revoke self representation. A decision of the trial court that was not subject to discretion cannot be reviewed for an abuse of discretion. (*ALRB v. Laflin and Laflin* (1979) 89 Cal.App.3d 651, 667, "It would be both inappropriate and futile for us to attempt to review for abuse a

discretion the court was never requested to exercise and did not purport to exercise.")

Respondent cites *People v. Welch* (1999) 20 Cal.4th 701, 735 for the proposition that abuse of discretion is the proper standard. However, *Welch* was not a revocation case, and the defendant there was constantly obstreperous in court. The ruling does not apply where the well-behaved defendant has an unqualified right to represent himself.

Furthermore, in California, legal questions are subject to independent review on appeal. (*Crocker National Bank v. San Francisco* (1989) 49 Cal.3d 881, 888.) Here, the question is not whether appellant tried to delay the trial or disrupted it. Instead, the question is a legal one - even assuming appellant engaged in misbehavior, does such conduct authorize revocation of self-representation as a matter of law. The reviewing court need not resolve any factual questions in order to reach this question. Black letter law in California confirms that the absence of any effort to use self-representation as a weapon to delay or disrupt the trial prohibits the trial court from revoking that right. Thus, the issue raised here is subject to independent review.

### B. Appellant Did Not Interfere With His Trial.

> "We assume, without deciding, that where there has been experience with the particular defendants that is plainly identifiable as disruptive in character, such as to overturn the premise of reasonable cooperation, and permit a finding of anticipatory breach and waiver, that would be a predicate for denying the *pro se* right. We do not think any such predicate

appears in this case." (*United States v. Dougherty, supra,* 473 F.2d at p. 1126.)

Appellant was arrested on October 26, 1999, after he voluntarily surrendered to authorities. (RT 1035, 1299; CT 608.) Counsel was appointed to represent him. In March, 2000, Dayton Calli turned over to jail authorities a letter given to him by appellant for delivery to another inmate. The letter described a deal, apparently for money, in which the inmate would claim he had killed Rodriguez. (RT 617-620.) Appellant was represented when this incident occurred.

On March 3, 2000, incriminating letters were seized from appellant's jail cell. (CT 328.) On March 10, 2000, additional incriminating letters were seized from Rose Periott's home. (RT 135; CT 314.) Appellant was represented at the time. There is no indication in the record that the letters delayed or obstructed appellant's trial in any way. Indeed, they became some of the most damning evidence against appellant at his subsequent trial.[4] (RT 20-25; 612-624; 671-700; 1302; 1307; 1539-1559.)

The preliminary hearing was held on August 2, 2000. (CT 1.)

On December 6, 2000, eight months after the letters were seized and almost seven months before the trial, appellant exercised his right to represent himself. (RT B-3, "I am asking to go pro per.") "When a motion to proceed pro se is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so." (*People v. Windham* (1977) 19 Cal.3d 121,

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[4] Respondent reports, without comment, that in October, 2000, voir dire began in appellant's case but was ended when his attorney moved to continue the case so appellant could hire private counsel. (CT 166; RBM 4.) Neither the prosecutor nor the court ever asserted that these facts had any relevance to the issue of appellant's self-representation.

128; *People v. Burton* (1989) 48 Cal.3d 843, 852.) Since appellant's request for self-representation was timely, the court was required to grant it. It had no discretion to deny the timely motion.

Appellant explained that he wanted to do some investigation on his own behalf in order to present a defense to the charges. (RT B-3) The court tried to discourage self-representation. (RT B-3, B-4.) Appellant ultimately decided to dismiss his court appointed attorney and represent himself. He was thoroughly admonished by the court of the consequences of such a decision and he initialed and signed a detailed petition to proceed in propria persona. (RT B-6 - B-9; CT 167-172.) The trial court relieved the alternative public defender as appellant's counsel and appellant proceeded to represent himself. (RT B-9.) The court also appointed stand-by counsel who was not to contact appellant, but would receive copies of all discovery. (RT B-10, B-14.) Stand-by counsel would receive unredacted copies of discovery and appellant could contact the attorney if he desired. (RT B-16.) The court ordered, however, that stand-by counsel was not representing appellant. (RT B-16.) Finally, the court instructed appellant's prior counsel to turn all discovery over to the district attorney, who would then turn it over to appellant, with redactions of some addresses. (RT B-11, B-15.) Appellant then agreed to a continuance of the trial date. (RT B-13.)

At no time during appellant's exercise of his *Faretta* rights did the court allude to or discuss appellant's behavior in prison. It did not cite or express any concern that the letters appellant had written while represented could or would have any effect on his right of self-representation. The court did not warn appellant that his right could be revoked on the basis, among others, of his previous behavior.

On December 19, 2000, the prosecutor provided appellant with "all available documents" and cassette tapes. (CT 175.) On February 7, 2001, the parties and the court conferred regarding discovery. The prosecutor noted that the defense investigator would have a more complete copy of the discovery than Mr. Carson and that "what Mr. Carson would need to do is then fashion some form or way of working with the investigator in order to do whatever he wants to do with those records." (Respondent's Request for Judicial Notice, transcript of hearing, February 7, 2001 at p. 3.) The prosecutor itemized the discovery he was providing. (*Id.* at pp. 5-8.) Carson represented himself. He sought discovery and was at all times courteous to the court and counsel. (See hearing of February 7, 2001 at pp. 11-13.) In an ex parte hearing regarding access to legal materials, he was likewise persistent but courteous. (See hearing of February 7, 2001 at pp. 14-17.) His request for a legal runner was granted. (Hearing of February 7, 2001 at p. 19.)

On March 19, 2001, appellant moved the court to appoint advisory counsel. (RT C-7.) The court denied the motion. (RT C-10.) Appellant made a motion for appointment of a ballistics expert and an identification expert. Both motions were granted. (RT C-14, C-15.) Appellant moved for appointment of an expert in cellular phones and the court denied the motion. (RT C-19.) Appellant also complained that his investigator was not progressing adequately with the investigation of the case. (RT C-20.) Appellant's written motions were legible and meticulously prepared. (CT 180-188, 191-198, 201-206, 210-232.) Appellant was at all times cordial and temperate toward the court and counsel in his appearances. (RT C-1 - C-10, D-1 - D - 10.)

On March 22, 2001, appellant's investigator was dismissed and a new one, James Richardson, appointed. (RT D-2.) Richardson was unaware that appellant had only been provided with redacted discovery, and apparently provided appellant with unredacted discovery. Richardson was an experienced investigator and must bear some responsibility for providing the prohibited materials to appellant.

The matter was aired at a hearing on March 28, 2001. (RT D-1, et seq.) According to the court, Richardson and the district attorney informed the judge that appellant had obtained some discovery that was delivered to him in error. (RT D-2.) As a result, the judge ordered the sheriffs to remove all of appellant's case files from his cell and deliver them to the court. (CT 238, RT D-2, D-3.) According to Richardson, some unredacted documents were left with appellant overnight. (RT D-3.) In particular, the district attorney was concerned that the information included phone numbers, addresses and "rap" sheets that had been "specifically handled in terms of our discovery requests here." (RT D-4.) Mr. Richardson did not understand that appellant might not be entitled to all discovery since he was representing himself. (RT D-4.)

The district attorney argued that appellant had tried to set up alibis and arrange for another individual to admit to the crime. (RT D-5.) The district attorney represented that appellant sought to see a rap sheet for Dayton Calli, D.M.V. printouts, other printouts and other private information contained in the discovery in the case. (RT D-6.)

The new investigator stated at the hearing that he provided appellant with the "murder book" so he could get what he did not have. (RT D-6.) He said that appellant took some sections of the "murder book." (D-7.)

Defendant stated that he got the murder book and was interested in information that had been gathered in 2000. (RT D-8.) He said he left some of the information alone when he realized he was not supposed to have it. (RT D-8.) He never denied that the investigator had perhaps given him somewhat more than he was entitled to. He stated to the court that he did not note the names, phone numbers or addresses of anybody he was not supposed to have. (RT D-9.) He requested that the court and not the prosecutor inspect the documents taken from his cell since they had his work privilege notes on them. (RT D-8.) He said he got the rap sheet for Dayton Calli in order to prepare to impeach him should be testify at trial. (RT D-9.) He confirmed to the court that he wanted to try his case and try it correctly. (RT D-10.)

The prosecutor stated that appellant knew he was not to have Calli's rap sheet. (RT D-10.) He said he was concerned that Calli had been threatened for "ratting out" on the basis of "paper" but he did not state that appellant was involved. (RT D-11.) He indicated that the discovery included phone numbers and addresses of individuals who were tangential to the case and could be easily intimidated. (RT D-11.) He stated that in his opinion appellant knew he was getting information he was not supposed to have. (RT D-11, D-12.) He indicated that the boxes might not contain any information appellant was not supposed to have, but that, in his opinion, appellant had obtained such information. (RT D-13.) He stated that this was not an accident. (RT D-14.)

The investigator stated that appellant wanted a copy of the Calli rap sheet. (RT D-14.)

In response, appellant stated that he wanted some things set aside for discussion with his investigator. He said he wanted documents copied. (RT

D-14.) He also stated that he did not know he would be deprived of his documents until the deputies actually arrived and he did not dispose of anything in contemplation of such an event. (RT D-15.) He again acknowledged that he accidentally got some information he should not have had. (RT D-15.) He could not contact the investigator immediately because he did not have access to a phone. (RT D-16.) He returned everything to the investigator and kept nothing. (RT D-16.)

The prosecutor then left the hearing and the investigator and appellant had a colloquy before the judge. (RT D-17.) The investigator said that he gave appellant the murder book so that he could determine if he was missing anything. He did not know about any redactions. (RT D-17.) He received documents to copy and the district attorney told him they contained information appellant was not to have. (RT D-17, D-18.) He contacted the judge, who told him not to give copies to appellant. He called appellant, who told him he was entitled to the information. (RT D-20.)

The investigator sought to resign and appellant asked him to remain on the case. (RT D-21.) The hearing on the issue ended as follows:

The Court: Mr. Carson, I feel that you have already done things that you were not supposed to do. That you've already received information that you knew you were not to receive. That you have that information in your possession for a period of time. This was information that was not to be in your possession, not to be - -

The Defendant: But it was of no fault of my own.

The Court: And I'm going to at this time, I feel that Mr. Carson, with all due respect - -

The Defendant: Please, your honor, don't do this.

The Court: – you are a very, very manipulative person.

The Defendant: No, I'm not, your honor.

The Court: Mr. Carson. All right. You and I have a very grave disagreement in that regard.

The Defendant: How am I manipulative?

The Court: At this time I feel that you are no longer entitled to your pro per privileges. I'm going to remove your pro per privileges from you. (RT D-21, D-22.)

The court did not warn appellant that any attempts to obtain prohibited discovery would waive his right to represent himself and did not consider lesser remedies, such as a restriction on jail pro per privileges, to address its concerns. Instead, the court imposed the most drastic remedy; it deprived appellant of his Sixth Amendment right to represent himself.

Appellant then again moved the court for pro per privileges along with an appointed counsel. (RT D-24.) He had done a great deal of legal research and wanted to continue to help with his case. (RT D-24.) The court held that he lose his "law work and everything." (RT D-24.) Against his wishes, the court appointed counsel for appellant who represented him throughout the trial. (RT D-24.)

### C. Appellant Represented Himself in an Exemplary Way and Made No Effort to Delay or Disrupt Proceedings.

Appellant could not be forced to accept an appointed attorney because his behavior throughout the proceedings was proper. He made motions and he questioned the judge's rulings, but he was never discourteous. He never sought to disrupt the proceedings. He did not seek to use his pro per status to delay the trial. (See, *Larrabee v. Bartlett*

(N.D.N.Y. 1997) 970 F.Supp. 102, 107, defendant cooperative during *Faretta* hearing, did not seek delay and did not intend to disrupt the proceedings.) A complete review of the record reveals that he was extremely articulate and that his behavior never strayed from that to be expected of a courtroom advocate.

For instance, appellant moved for an expert in eyewitness identification. (RT C-15.) The court carried on an extended colloquy with appellant concerning the need for such a witness.

> The Court: Without revealing too many confidences here, as I say, I have never read the transcript of the preliminary hearing in this case or really know anything about the evidence in this case, but is this of the alleged eyewitness, we are talking about one person?[5]
>
> The Defendant: Yes, your Honor.
>
> The Court: The alleged eyewitness, is the somebody known to you?
>
> The Defendant: No your Honor. She didn't know me.
>
> The Court: Has had any acquaintance with you in the past?
>
> The Defendant: No, she hasn't, your honor.
>
> The Court: A stranger.
>
> The Defendant: Is a total stranger. She – no one there was. There was approximately seven or eight people at the scene of the crime. And no one saw anything. . . . . (RT C16, C16.)

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[5] The transcript reads "I witness" rather than "eyewitness" but this is obviously in error.

This interchange is characteristic of Mr. Carson's representation of himself. He answered the court's questions truthfully and advocated for his position. Ultimately, the trial court granted his motion for appointment of the expert. (RT C-18.)

When appellant's motions were denied, he maintained his equanimity. For instance, when he sought a cell phone expert his response was reasonable:

> The Court: That's what you are going to subpoena in. There is no expert as such that's going to come in. There is somebody, you know, some phone company personnel, somebody from the phone company, whether –whatever company it is, whether it's L.A. Cellular or whatever the other ones are that are out there now.
>
> The Defendant: Okay. (RT C-19.)

"The record up to the time of the *Faretta* motion shows that defendant generally called motions by their proper legal names, referred to appropriate authorities and clearly and consistently articulated a tenable theory of defense." (*People v. Clark, supra,* 168 Cal.App.3d at p. 108.) Indeed, his courtroom demeanor showed the sophistication and understanding of a professional advocate.

At the hearing in which his self-representation was revoked, appellant was at all times calm and considerate. Unlike the defendants in *Dougherty*, he did not respond to the court's order with protests and complaints.

For instance, he discussed what had happened with the judge:

> The Court: But you do acknowledge that, that there were some items that were turned over to you by inadvertence

that you had in your possession for some period of time until they were claimed by Mr. Richardson?

The Defendant: For approximately nine hours, yes, your honor, inadvertently. I did not ask him for that. He did not ask me about what I wanted or what I didn't want. I didn't know what was being turned over exactly until I had it in my possession. And at that time –

The Court: You looked at these items?

The Defendant: I had to go look through them because I looked through each page to find out what I didn't have. . . .

The Court: You didn't call Mr. Richardson up immediately when you discovered you found some items and call him up and say, look, you brought me some items I am not supposed to have, I know I am not supposed to have them? You didn't call the court?

The Defendant: I would have loved to do that your Honor, but it was already – he had dropped it off I believe past eight o'clock, if I am not mistaken. He left me with a card with a 888 number which I cannot access from anywhere in the jail system. . . . I was just basically with my hands tied. I returned everything back over to Mr. Richardson. I kept nothing. I removed nothing. (RT D-15, D-16.)

Thus, even when appellant was accused of receiving discovery he should not have, he admitted that he had done so. (RT D-8, D-15.) He left the information he was not supposed to have and did not write down any of it. (RT D-8, D-9.) He did not attempt to deny or cover up what had happened. He did not become enraged and curse the court or engage in any

of the disruptive and disrespectful behavior found in the cases. He was respectful and responsive.

Appellant's behavior did not begin to match those of the defendants in those cases in which the right to self-representation was revoked. He did not storm out of the courtroom and refuse to proceed (*United States v. Brock* (7th Cir. 1998) 159 F.3d 1077, 1078, 1079), he did not go "berserk" by cursing the judge in the most foul manner, or refuse to review discovery materials, earning numerous citations for contempt (*United States v. Young* (S.D.Oh. 2001) 199 F.Supp. 697, 699- 701), threaten to stand mute (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1043), or seek a year's delay and make multiple continuance motions (*People v. Fitzpatrick* (1998) 66 Cal.App.4th 86, 90-92; see also *State v. Christian* (Minn. 2003) 657 N.W.2d 186, 189, 190.) Thus, the trial court deprived appellant of his rights under the Sixth Amendment when it revoked his pro per status.

### D. None of Appellant's Actions Obstructed the Progress of the Trial.

Since appellant's request for self-representation was timely made, the trial court was required to grant it and to maintain it. For instance, in *People v. Rudd* (1998) 63 Cal.App.4th 620, the court emphasized that the revocation of self-representation was discretionary because the original grant was discretionary. It stated no opinion on the proper outcome where, as here, appellant's right to self-representation was unqualified. (*People v. Rudd, supra,* 63 Cal.App.4th at pp. 632, 633, "We reach our conclusion in this regard in the context of a defendant who, because of the belated nature of his self-representation request, had no unqualified right to proceed pro se. We do not address the effect of a scenario where a timely request to proceed pro se created an unqualified right of self-representation, assuming the accused was competent to waive the right to counsel.") Similarly, in *State v. Christian* (Minn. 2003) 657 N.W.2d 186, 193, the court held that a late *Faretta* motion that had been discretionarily granted could be denied the next day in an exercise of discretion. By contrast, the grant of the motion in this case was mandated and the trial court had no right to revoke self-representation in the absence of obstructive behavior.

The trial court stated no grounds for its action other than that appellant was "manipulative." (RT D-21, D-22.) Yet many lawyers and defendants are manipulative. (*State v. Richards* (Minn. 1990) 456 N.W.2d 260, 266, manipulative and argumentative defendant entitled to represent himself.) This quality provides no ground for revocation of self-representation. Respondent's grounds are derived from the wholly improper arguments of the prosecutor, who inserted himself into the question of appellant's representation.

As noted by the Court of Appeal, it was the responsibility of the prosecutor to help protect appellant's self-representation right. (See *People*

*v. Dent*, *supra*, 30 Cal.4th at 222, fn.2.) Yet the prosecutor in this case acted directly contrary to his duty. He instigated and aided in the court's unconstitutional action and deprived appellant of the representation he wanted and had a right to - himself. (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 490, 491 (*Boulas*).) "The state is obliged 'to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command.' (*People v. Crovedi* (1966) 65 Cal.2d 199, 206 [53 Cal.Rptr. 284, 417 P.2d 868].) The state must respect, and not interfere with, a defendant's 'right to decide for himself who can best conduct the case . . . .' (*Maxwell v. Superior Court* [(1982)] 30 Cal.3d [606], 615.)" (*Boulas* at p. 431.) The prosecutor, an agent of the state, did not respect appellant's Sixth Amendment rights but successfully moved the trial court to terminate his pro per status, remove all of his legal and factual preparation from his control and place his case and his fate in the hands of an attorney he did not want. Thus, the prosecutor too violated appellant's Sixth Amendment rights.[6]

In addition, the substance of the prosecutor's arguments, now adopted by respondent, was insufficient to justify the court's ruling. Respondent lodges four allegations against appellant as justifications for the revocation of self-representation. The allegations can be placed into two categories; those events which occurred before appellant started representing himself and those which occurred thereafter.

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[6] Respondent emphasizes that the prosecutor was not present for a portion of the revocation hearing. However, the record reflects that the prosecutor urged the trial court to revoke self-representation and supplied reasons for the revocation. These actions were improper.

### 1. Actions Appellant Took or Allegedly Took While a Client and Before Self-Representation Which Did Not Disrupt the Trial Were Not A Proper Ground For Revocation of Self-Representation.

Respondent charges that appellant attempted to set up an alibi with letters to various witnesses and sought to arrange for another inmate to take the blame for the offense. Respondent suggests that witness intimidation was a problem but only in the most vague terms. All of these allegations arose while appellant was represented. Any actions he took during this period were as a client and not as an attorney. The court granted self-representation, as it was required to do, after these events because they did not delay or disrupt the trial in any way. There was no recurrence of the behavior. These allegations are after-the-fact excuses for the court's subsequent revocation of self-representation and are utterly irrelevant to the inquiry here. In *United States v. Dougherty*, *supra*, 473 F.2d at pp. 1126, 1127, the prosecutor sought to point to misbehavior occurring after the defendant's self-representation motion had been denied to support the prior denial. The *Dougherty* court rejected such after-the-fact excuses. By parity of reasoning, defendant's actions which did not stand in the way of self-representation at the outset may not later become excuses for the revocation of self-representation.

Respondent argues that appellant might attempt to intimidate a witness, Mr. Calli. Respondent argues that, as a general matter, witness intimidation is a problem in certain cases. (RBM 17.) Its argument is flawed on many levels. Other than the prosecutor's self-serving allegations, the record is bare of any evidence that Mr. Carson intimidated a single witness. The Court of Appeal questioned whether a fundamental

constitutional right can be denied on the basis of unsworn representations. (*People v. Carson, supra,* 109 Cal.App.4th at p. 988, fn. 10.) There was no showing that any intimidation that may have taken place was instigated by Mr. Carson. Mr. Calli's involvement in the case occurred while Carson was represented and before he started representing himself. There was no evidence that a single witness in this case failed to testify because of threats.

Respondent's legal argument on this point is also irrelevant to this case. Citing gang cases, respondent argues that witnesses hesitate to come forward for fear of retaliation. (RBM 16.) This was not a gang case. There were no gang allegations, no suggestion of gang involvement, and no eyewitnesses who failed to come forward. Indeed, several witnesses from the neighborhood did testify at trial. None testified that he had been threatened or intimidated in any way, evidence the prosecutor, anxious to bolster the witness' credibility, would surely have presented to the jury had there been any. There is no evidence in this record that the trial was delayed or disrupted due to witness intimidation.

Finally, the witness allegedly under threat, Mr. Calli, was in the Los Angeles County jail. He was under the full control of the authorities, who could not only protect him from retaliation, but could assure that he appeared as a witness, if necessary. He surely had charges pending against him, a circumstance that provides the prosecutor with any number of opportunities to secure testimony.

Respondent suggests that a defendant could conduct nefarious business while interviewing a witness. (RBM 22.) Respondent's argument is utterly speculative. "By definition, substantial evidence requires evidence and not speculation. In any given case, one may speculate about any number of scenarios that may have occurred . . . . A reasonable

inference, however may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guess work . . . .A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to the probabilities without evidence." (*People* v. *Thomas* (1992) 2 Cal.4th 489, 544-545.) Respondent does nothing more than "speculate about any number of scenarios that may have occurred." Respondent points to nothing in the record to suggest that appellant interviewed any witnesses, much less that he exploited any interviews. Even if he did, the court could order that standby counsel attend any interviews to assure proper behavior.

Respondent also argues that a defendant might be deprived of his right to self-representation because a trial court "could not foresee all the means by which appellant would or could use his pro per status." (RBM 22.) But denial of the unconditional Sixth Amendment right to self-representation cannot be based on speculation about future behavior. (*United States v. Dougherty*, *supra*, 473 F.2d at p. 1126.) As we have seen, any findings must be based on a "strong indication" that prior disruptive behavior will continue in the courtroom. (*United States v. Flewitt*, *supra*, 874 F.2d at p. 674.)

Respondent labels appellant as a "cold blooded murderer." (RBM 22.) However, a "*Faretta* motion cannot be denied because of the seriousness of the charge." (*People v. Hardy* (1992) 2 Cal.4th 86, 196.)

Respondent's concern about witness intimidation is wholly unproven and misplaced in this case. It provided no ground for revoking appellant's *Faretta* rights.

### 2. Discovery Violations Did Not Disrupt the Trial or Justify Removal of Appellant as His Own Attorney.

The only misbehavior suggested by respondent that occurred while appellant represented himself was the receipt of discovery materials he was not entitled to. It was this episode that provoked the revocation.

It has often been said that a self-represented defendant gains no rights greater than those of an attorney. (*United States v. Merrill* (9th Cir. 1984) 746 F.2d 458, 465; *United States v. Flewitt*, *supra* 874 F.2d at p. 675.) It is also true that *"Faretta* simply requires that a pro. per. defendant be given the same treatment as an attorney." (*People v. Smith* (1985) 38 Cal.3d 945, 951.)

Throughout this case, appellant's attorneys have had access to all the discovery material, including the addresses, phone numbers, and rap sheets that were apparently withheld from appellant. For a represented defendant the courts often implement a compromise - the attorney sees all the discovery and some is kept from the defendant. For an unrepresented defendant, that compromise is impossible. The unrepresented defendant must be supplied with all discovery or his Sixth Amendment right to self-representation is infringed. (*United States v. Flewitt*, *supra,* 874 F.2d at p. 675, defendants representing themselves criticized for failure to take advantage of discovery materials.)

It is inconceivable that a trial court would dismiss a defense attorney for receiving discovery material to which he was not entitled. A court might impose sanctions, or even give preclusive jury instructions, but such violations are not uncommon and they do not as a practical matter result in the removal of offending attorneys. Since appellant was entitled to the

rights of any attorney, he could not be removed from his own representation for obtaining the prohibited discovery.

The trial court did not revoke appellant's pro per status because he attempted to disrupt his own trial. It revoked his status because he allegedly abused his pro per privileges in jail. However, violations of procedural and substantive rules are insufficient to justify the revocation of self-representation. (*United States v. Flewitt*, *supra,* 874 F.2d at p. 674.) Even assuming, without conceding, that he did violate some rules, the trial court erred in forcing him to accept appointed counsel.

Appellant's jail pro per privileges were subject to court or administrative limitation upon notice and hearing. (*Wilson v. Superior Court* (1978) 21 Cal.3d 816, 823.) "Pro. per. status should not give an inmate immunity from disciplinary sanctions that would normally be imposed for jail misconduct. By this we mean that a pro. per. inmate should not be relieved of a disciplinary punishment solely because the punishment might interfere with the exercise of his pro. per. privileges. A pro. per. inmate may be subjected to the same sanctions that are imposed on other inmates for similar misconduct." (*Id.*, at pp. 824, 825.) Pro per privileges should not be withdrawn as a punishment, but as an incident to the punishment that would be inflicted on any other inmate. (*Id.*, at pp. 824, fn. 7.) Thus, the disciplinary and other control mechanisms of the jail were more than adequate to limit appellant's misconduct without interfering with his Sixth Amendment rights. The record does not show that appellant was subjected to any discipline for his activities in jail. Instead, the court imposed the ultimate sanction, without warning and in violation of appellant's Sixth Amendment rights.

Respondent suggests that a limitation on jail privileges might deprive appellant of a defense. (RBM 16, 17.) This Court has already held that a self-represented defendant may be subject to sanctions in jail. (*Wilson v. Superior Court, supra,* 21 Cal.3d at p. 823.) These disciplinary measures do not affect his ability to represent himself, which is drastically limited by incarceration in any case.

The only case uncovered by extensive computer assisted research with a factual predicate like this one is *Ferrel v. Superior Court, supra*, 20 Cal.3d at pp. 891, 892 (*Ferrel*). Respondent concedes that the result in *Ferrel* was correct, but disputes the reasoning. The result in *Ferrel* was correct, and the same result is required in the present case. As here, the defendant represented himself before the Los Angeles Superior Court. (*Ibid.*) As a result, he was entitled to out-of-court privileges including access to a law library, use of legal runners, telephone privileges, witness interviews and the use of an investigator. (*Id.,* at p. 890, n. 2.) Although the record in the present case does not reflect the exact extent of appellant's out of court privileges during the period he represented himself, they included at least library privileges and the use of a runner and an investigator. Appellant also had standby counsel who could not call him, but whom he could consult on his own initiative.

As here, the defendant in *Ferrel* allegedly violated jail rules. (*Id.,* at p. 891, n. 3.) On these grounds, the trial court terminated his right to self-representation. Like appellant, the defendant in *Ferrel* used some of the privileges of pro per status to violate the rules. However, since these activities did not delay or disrupt the trial, both were wrongly denied the right to represent themselves.

While represented, appellant used extremely poor tactics to attempt to defend himself, including the solicitation of testimony that someone else committed the offense and alibi testimony from others that he admitted was not accurate. However, so long as he did not disrupt or delay the trial, his actions as a defendant are insufficient to deny his right of self-representation. For instance, in *Flewitt*, the court noted that the defendants made vague and unreasonable discovery demands and failed to use discovery already provided, but "that was their choice to make." (*Flewitt* at p. 673.) That appellant made similarly bad choices did not justify a revocation of his pro per status.

Respondent states that appellant played "cat and mouse" with the court, attempted to "subvert" the trial, and "undermine" the trial process. (RBM 22.) But saying so does not make it so. He was quite straightforward with his claim for self-representation and did not waiver from it once he started to represent himself. Indeed, appellant sought to review discovery to assist him in case investigation and preparation. He wanted to expedite, not delay, the trial. (See *People v. Dent, supra,* 30 Cal.4th at p. 221, [defendant sought self-representation to expedite the trial].) As respondent concedes, his demeanor in court was exemplary. The record simply does not support respondent's characterizations.

### E. The Trial Court Failed to Warn Appellant or Impose Available Remedies for Appellant's Activities Short of Revoking His Right to Self-Representation.

The trial court never gave appellant a warning concerning what types of behavior might result in a forfeiture of his right to represent himself. (*State v. Whalen* (1997) 961 P.2d 1051, 1054, defendants warned if they

refused to cross the bar, counsel would be appointed.) It simply revoked self-representation in the first instance when appellant viewed unredacted discovery.

Assuming that the state had an interest in controlling appellant's activities, or at least some of them, it could have accomplished the goal without appointing unwanted counsel. Where an important state interest affects constitutional rights, the state must choose a way to achieve its goals with the least burden on the constitutionally protected activity. (*Dunn v. Blumstein* (1972) 405 U.S.330, 336 [92 S.Ct. 995, 31 L. Ed.2d 274].) The trial court in this case failed to control appellant's behavior in a way that created the least possible burden on his Sixth Amendment right to self-representation.

The trial court had a vast array of tools available to it for restricting appellant's activities while at the same time protecting his pro per status in court. It could hold him in contempt of court if he violated a court order. It could revoke his pro per privileges in jail and allow him to represent himself in court. He was an inmate in the county jail. The trial court and the deputies had complete control over his possessions and his person. It could require that he store and review discovery materials at a secure site (*United States v. Young, supra,* 199 F.Supp. at p. 699.) His jailors could restrict his right to communicate, orally or in writing, with his girlfriend or any other individual. They had the power to control his contact with other individuals, be they other inmates, visitors, or his jailors.

### F. Deprivation of the Right of Self-Representation is Reversible Per Se.

Since it is not amenable to review for prejudice, the trial court's denial of appellant's Sixth Amendment right to represent himself is reversible per se. (*People v. Joseph* (1983) 34 Cal.3d 935, 946-948; *United States v. Arlt* (9th Cir. 1994) 41 F.3d 516, 524; *Savage v. Estelle* (9th Cir. 1990) 925 F.2d 1459, 1466; *Adams v. Carroll* (9th Cir. 1989) 875 F.2d 1441, 1445.) Thus, the Court of Appeal properly reversed appellant's conviction.

## CONCLUSION

**The trial court deprived appellant of his constitutional right to represent himself. On this and the additional grounds argued above, he asks the Court to affirm the Court of Appeal's judgment reversing his conviction.**

Date: November 16, 2004 Respectfully submitted,

THE LAW OFFICES OF CHRIS R. REDBURN

By:
Chris R. Redburn
Attorney for Appellant
DAVID CARSON

**CERTIFICATE OF COMPLIANCE WITH THE CALIFORNIA RULES OF COURT, RULE 29.1(c)(1)**

I, the undersigned, hereby certify that the within Appellant's Answer Brief on the Merits contains approximately 11,652 words. This certification is based on the word count produced by WordPerfect, version 8.

Date: February 2, 2004 Respectfully submitted,

THE LAW OFFICES OF CHRIS R. REDBURN

By: __
Chris R. Redburn

DECLARATION OF SERVICE

Re: *People v. Carson* No. S117568

I, Chris R. Redburn, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 27332, San Francisco, California 94127. I served a true copy of the attached:

APPELLANT'S ANSWER BRIEF ON THE MERITS

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Each envelope was then, on February 4, 2004, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the first class postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this February 4, 2004.

Declarant